
**April 27, 2005**

**Op-Eds**
Up, Down or Out, Former Senate Majority Leader, Robert Dole, *NY Times*, 4/27/05
End abuse of filibuster, C. Borden Gray, *USA Today*, 4/27/05

**Noteworthy:**

"If we can compromise without basic principle being violated … we should compromise. … Basic principle is … remember … not a single … circuit judge had ever been killed on a filibuster in the first 214 years. And we have ten judges who were filibustered to death that had enough votes to become judges. The unfairness of the filibuster that hadn't been used for 214 years ought to be preserved, it seems. That's the principle of the Senate, to not filibuster judges to death."
**-Senator Grassley, CNN"s "Inside Politics," 4/26/05**

"Anything short of an up or down vote on these nominees seems to me to destroy the operating procedure we've had in the Senate for 214 years."
**-Senator McConnell, Fox News' "Special Report," 4/26/05**

"Where this is headed is in the direction of 41 members of the Senate being able to dictate to any president who may be on the Supreme Court or a circuit court … That is a bad idea"
**-Senator McConnell, Senate Floor, 4/26/05**

"The democrats are the ones who started this. If they were to shut down the government, they will suffer."
**-Senator Dole, Fox News' "Special Report," 4/26/05**

**Up, Down or Out By Bob Dole**
**New York Times**

WASHINGTON -- IN the coming weeks, we may witness a vote in the United States Senate that will define the 109th Congress for the ages. This vote will not be about war

and peace, the economy or the threat from terrorism. It will focus instead on procedure: whether the Senate should amend its own rules to ensure that nominees to the federal bench can be confirmed by a simple majority vote.

I have publicly urged caution in this matter. Amending the Senate rules over the objection of a substantial minority should be the option of last resort. I still hold out hope that the two Senate leaders will find a way to ensure that senators have the opportunity to fulfill their constitutional duty to offer "advice and consent" on the president's judicial nominees while protecting minority rights. Time has not yet run out.

But let's be honest: By creating a new threshold for the confirmation of judicial nominees, the Democratic minority has abandoned the tradition of mutual self-restraint that has long allowed the Senate to function as an institution.

This tradition has a bipartisan pedigree. When I was the Senate Republican leader, President Bill Clinton nominated two judges to the federal bench -- H. Lee Sarokin and Rosemary Barkett -- whose records, especially in criminal law, were particularly troubling to me and my Republican colleagues. Despite my misgivings, both received an up-or-down vote on the Senate floor and were confirmed. In fact, joined by 32 other Republicans, I voted to end debate on the nomination of Judge Sarokin. Then, in the very next roll call, I exercised my constitutional duty to offer "advice and consent" by voting against his nomination.

When I was a leader in the Senate, a judicial filibuster was not part of my procedural playbook. Asking a senator to filibuster a judicial nomination was considered an abrogation of some 200 years of Senate tradition.

To be fair, the Democrats have previously refrained from resorting to the filibuster even when confronted with controversial judicial nominees like Robert Bork and Clarence Thomas. Although these men were treated poorly, they were at least given the courtesy of an up-or-down vote on the Senate floor. At the time, filibustering their nominations was not considered a legitimate option by my Democratic colleagues -- if it had been, Justice Thomas might not be on the Supreme Court today, since his nomination was approved with only 52 votes, eight short of the 60 votes needed to close debate.

That's why the current obstruction effort of the Democratic leadership is so extraordinary. President Bush has the lowest appellate-court confirmation rate of any modern president. Each of the 10 filibuster victims has been rated "qualified" or "well qualified" by the American Bar Association. Each has the support of a majority in the Senate. And each would now be serving on the federal bench if his or her nomination were subject to the traditional majority-vote standard.

This 60-vote standard for judicial nominees has the effect of arrogating power from the president to the Senate. Future presidents must now ask themselves whether their judicial nominees can secure the supermajority needed to break a potential filibuster. Political considerations will now become even more central to the judicial selection process. Is this what the framers intended?

If the majority leader, Bill Frist, is unable to persuade the Democratic leadership to end its obstruction, he may move to change the Senate rules through majority vote. By doing so, he will be acting in accordance with Article I of the Constitution (which gives Congress the power to set its own rules) and consistently with the tradition of altering these rules by establishing new precedents. Senator Frist was right this past weekend

when he observed there is nothing "radical" about a procedural technique that gives senators the opportunity to vote on a nominee.
Although the Democrats don't like to admit it, in the past they have voted to end delaying tactics previously allowed under Senate rules or precedents. In fact, one of today's leading opponents of changing the Senate's rules, Senator Robert Byrd, was once a proponent of doing so, and on several occasions altered Senate rules through majoritarian means. I have great respect for Senator Byrd, but Senate Republicans are simply exploring the procedural road map that he himself helped create.
In the coming days, I hope changing the Senate's rules won't be necessary, but Senator Frist will be fully justified in doing so if he believes he has exhausted every effort at compromise. Of course, there is an easier solution to the impasse: Democrats can stop playing their obstruction game and let President Bush's judicial nominees receive what they are entitled to: an up-or-down vote on the floor of the world's greatest deliberative body.

## End abuse of filibuster –USA TODAY

By C. Boyden Gray

We often hear of the Senate's history as the "cooling saucer." Yet this analogy doesn't refer to the filibuster, or even limitless Senate debate, which was not used as a blocking mechanism in the republic's early years.

Rather, the Senate was "cooler" than the House of Representatives because its members were elected to six-year terms — separated by election into three classes — and, primarily, because its members were chosen not by the people but by the state legislatures. Thus, senators were thought to be aloof from the short-term passions and pressures of the House.

While minority rights are a significant Senate tradition, the Constitution itself, through the "advice and consent" clause, clearly mandates confirmation of judges by simple majority once every voice has been heard.

The filibuster is not enshrined among the Constitution's system of checks and balances. Judicial filibusters of majority-supported nominees have never been part of the Senate's tradition. In the past two decades, even with the stakes at their highest, Democrats did not filibuster Supreme Court nominees Robert Bork or Clarence Thomas. Yet in the 108th Congress, Democrats filibustered 10 of 34 appellate court nominees. President Bush's first-term appellate confirmation rate was the lowest in modern times.

The filibuster is not sacrosanct. In fact, there are dozens of laws on the books today that prohibit filibusters on a variety of measures. If it is acceptable, for example, for fast-track authority to preclude filibuster of trade agreements, surely it is acceptable to preclude filibusters where they have never been used in 200 years.

Republicans should restore Senate tradition by ensuring filibusters cannot be used where they were never intended: against a president's judicial nominees.

Judicial filibusters politicize and thus undermine the independent judiciary. Moreover, requiring a supermajority for confirmation allows the minority party to determine the makeup of the federal courts, a diversion to recapture power by changing the constitutional rules of the game rather than going back to the ballot box.

C. Boyden Gray, former counsel to President George H.W. Bush, is chairman of the Committee for Justice.